Supreme Court, U.S.
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No. 93-1857

In The

Supreme Court of the United States

October Term, 1993

CARPENTERS DISTRICT COURT OF NEW ORLEANS AND VICINITY; INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL 130; AND INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL 406; ROBERT GRAVES, MARTIN N. LUDWIG, SR., DONALD J. LUDWIG, MELVIN BOE, ALCIDE BOUDREAUX, ALBERT CASTANEDA, EDWARD P. GEBHARDT, JR., FLORIAN J. LIZANA, III, WARREN L. MINTER, DALBERT PERRON, AND KENNETH SMITH, ON BEHALF OF THEMSELVES AND ALL OTHER SIMILARLY SITUATED,

Petitioners,

vs.

DILLARD DEPARTMENT STORES, INC. AND D.H. HOLMES, LTD.,

Respondents.

Response To Petition For Writ of Certiorari To The United States Court of Appeals For The Fifth Circuit

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Under the Worker Adjustment and Retaining Act ("WARN"), does "back pay" mean the amount of pay an employee would have received had the plant remained open or the layoff been deferred until the conclusion of the notice period, or does it mean a penalty of a day's pay for each day of the shortened notice period, regardless of whether the employee would have worked those days?

LIST OF PARENT COMPANIES AND NON-WHOLLY OWNED SUBSIDIARIES

Dillard Department Stores, Inc. is the parent company of D.H. Holmes Company, Ltd. D.H. Holmes Broadcasting Corp. is a non-wholly owned subsidiary of D.H. Holmes Company, Ltd. Other non-wholly owned subsidiaries of Dillard Department Stores, Inc. include Central Ace Hardware Corp., CDI Contractors, Inc., EBR Associates, ABR Joint Venture, SI Lessors, Ingram Food Court Assoc., and Windsor Park Court Assoc.

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Respondents, Dillard Department Stores, Inc. ("Dillard's"), and D.H. Holmes, Ltd. ("Holmes"), pray that this Court deny the Petitioner's Writ of Certiorari to the

United States Court of Appeals for the Fifth Circuit on the question presented.

I. STATEMENT OF STATUTE INVOLVED

The question presented for review involves Section 5(a)(1) of the Worker Adjustment and Retraining Notification Act ("WARN") or ("Act"), 29 U.S.C. §2104(a)(1) (1988). Section 2104(a) states that:

(a) Civil Actions against employers

(1) Any employer who orders a plant closing or mass layoff in violation of section 2102 of this title shall be liable to each aggrieved employee who suffers an employment loss as a result of such closing or layoff for -

(A) back pay for each day of violation at a rate of compensation not less than the higher of -

(i) the average regular rate received by such employee during the last 3 years of the employee's employment; or

(ii) the final regular rate received by such employee; . . .

* * *

Such liability shall be calculated for the period of the violation, up to a maximum of 60 days, but in no event for more than one-half of the number of days the employee was employed by the employer.

(2) The amount for which an employer is liable under paragraph (1) shall be reduced by -

(A) any wages paid by the employer to the employee for the period of the violation;

(B) any voluntary and unconditional payment by the employer to the employee that is not required by any legal obligation;

* * *

(3) Any employer who violates the provisions of section 2102 of this title with respect to a unit of local government shall be subject to a civil penalty of not more than $500 for each day of such violation, except that such penalty shall not apply if the employer pays to each aggrieved employee the amount for which the employer is liable to that employee within 3 weeks from the date the employer orders the shutdown or layoff.

* * *

(7) For purposes of this subsection, the term, "aggrieved employee" means an employee who has worked for the employer ordering the plant closing or mass layoff and who, as a result of the failure by the employer to comply with section 2102 of this title, did not receive timely notice either directly or through his or her representative as required by section 2102 of this title.

II. STATEMENT OF THE CASE

In the Fall of 1988, a financially struggling D.H. Holmes Company, Ltd. began buy-out discussions with financially sound Dillard Department Stores, Inc.

Petitioners' Appendix, A-42. Those discussions resulted in their merger on May 9, 1989. A-42, 43. Upon their merger, Dillard's predictably began taking action to restore the old Holmes operations to a financially sound basis. This included the elimination of redundant management and staff corporate positions, the elimination of unneeded warehousing operations, and the closing of Holmes' money-losing flagship store on Canal Street in downtown New Orleans. A-4.

On April 19, 1989, most employees of Holmes' Corporate Division were given notices explaining that they would be terminated effective May 9, 1989, subject to Holmes' stockholders' approval of the merger with Dillard's. A-43. A second notice of termination was sent between April 21 and 28, 1989 to certain "transitional employees" in the Corporate and Warehouse Divisions notifying them that they would be laid off between May 9 and July 1, 1989. A-43. Dillard's distributed a third notice on May 12, 1989 informing employees in the Canal Street store that it would be closed and they would be laid off between June 10 and July 8, 1989. A-43.

All of the employees who were to be laid off did in fact receive a WARN notice. Of those employees who received a WARN notice, a significant number got a full 60 days of notice. Of those employees who did not get a full 60 days' notice, Dillard's calculated and paid to the employees the amount of "back pay" to which they would be entitled had

they received a full 60 days' notice. A-5, 44. (The propriety of certain offsets was litigated below and is not at issue in this Petition. Regardless, all employees who were laid off received either 60 days' notice or an amount of money equal to the amount of "back pay" the employees would have earned had they received the full 60 days' notice.)

Thus, all employees involved in this litigation received WARN notices. Those employees who did not receive a full 60 days of WARN notice were paid "back pay". A-44. The only issue raised in this Petition for Certiorari involves the question of whether an employer must pay an employee who does not receive a full 60 days' notice "back pay", consisting of either (1) the amount of pay the employee would have received had the plant remained open or had the layoff been deferred until the conclusion of the notice period, or (2) whether the employer is required to pay a penalty of one day's pay for each day that the notice was short, regardless of whether the employee would have worked on those days or not.

III. STATEMENT OF DISPUTED FACTS

At Page 4 of the Petitioner's Petition for Writ of Certiorari, under the heading of Statement of the Case, the Petitioners make the following statement: "In deciding who to lay off and when, Dillard's only considered the cost effectiveness of its actions, not the WARN Act or the futures

of the 800 people whose jobs would be cut." Respondent Dillard's vehemently disputes this alleged statement of fact. Dillard's not only considered the WARN Act, but took considerable steps to comply. As set forth above, all employees involved in this litigation received a WARN notice. In addition, many employees received the full 60 days' notice. As to those employees who did not receive a full 60 days, Dillard's made "back pay" payments to the employees. While it is true that Dillard's acted quickly and decisively in order to put the former Holmes operations on a sound financial basis, Dillard's did not do so without consideration of the WARN Act. Indeed, Dillard's took significant steps to comply with the WARN Act, and disputes Petitioner's claim to the contrary.

IV. REASONS FOR DENYING THE WRIT

A. The Supreme Court, twice this year, has denied a Petition For Writ of Certiorari on the very issue presented in the instant Petition for Writ of Certiorari.

In United Steelworkers of America, AFL-CIO-CLC v. North Star Steel Co., Inc., 5 F.3d 39 (3d Cir. 1993), cert. denied, ___ U.S. ___, 114 S. Ct. 1060 (1994), reh'g. denied, ___ U.S. ___, 114 S. Ct. 1585 (1994), this Court was presented with the very issue presented in the instant Petition for Writ of Certiorari. The Supreme Court first denied North Star Steel's Petition for Writ of Certiorari

before the Fifth Circuit's decision in the instant case. Subsequently, on a Petition for Rehearing made on the basis of split in circuits, the Supreme Court denied North Star's Petition for Rehearing. This Court has already determined that this issue is not of such significant importance that it warrants this Court's consideration, even given the split in the circuits.

Despite Petitioners' assertions, the resolution of this matter is not critical to the effectuation of the purposes of the WARN Act. Regardless of how this issue is resolved, employers must still give notice to employees and governmental agencies about certain impending layoffs or plant closures. Further, regardless of how this issue is resolved, employees who do not receive notice, or receive notice of less than 60 days, are entitled to "back pay" in lieu of such notice. Consequently, the only issue presented in this Petition is the relatively minor question of how much employees in such circumstances will be paid, not whether they will be paid.

This is a relatively new statute and it is not surprising that the first two Circuit Courts of Appeals to address this issue have created a split of authority. However, as other Circuit Courts of Appeals begin adding their weight to one side or the other, issues of this nature have a way of

resolving themselves amongst the Circuit Courts of Appeals, without the need for the intervention of the Supreme Court. Further, there is clearly nothing to prohibit Congress from stepping in and resolving this matter on its own.

B. The Fifth Circuit's decision is not contrary to the clear meaning of the statute.

When an employer does not give a full 60 days of notice to employees who are about to be laid off, the WARN Act provides that employees must be paid "back pay for each day of violation", and that local governments are entitled to "a civil penalty of not more than $500 for each day of such violation." 29 U.S.C. § 2104(a)(1), (3).

Petitioners would have this Court ignore the distinction between "back pay" for employees and a "civil penalty" for local governments. Instead Petitioners focus their entire argument on the phrase "for each day of violation." According to Petitioners, this language would have no meaning unless it means employees would receive back pay for each day of violation regardless of whether or not the employees would have worked those days. However, Petitioners' logic is flawed, because the language does in fact have meaning. Without this language in the statute, it would be arguable that an employer who gave less than 60 days' notice would be obligated to pay back pay for the full 60 days of notice, rather than paying back pay only for the

period of time that the notice was less than 60 days. This language simply makes clear that the "back pay" that an employer must pay encompasses the amount of time that the notice was less than 60 days.

The more appropriate focus on this issue is the focus on the difference between "back pay" and "penalty". Clearly, Congress used different terms to convey different meanings. "Back pay" is a term of art used to describe a monetary amount of compensation that an employee would have earned during a defined period of time but for some act of an employer. Whether the defined period of time is prospective or retrospective is immaterial to the concept of "back pay". Thus, with regard to WARN, the term "back pay" applies to the period of time that an employee gets less than 60 days' notice of a layoff. The employer's obligation is then to pay "back pay" to the employee for that defined period of time. Congress established in the statute the rate of pay that the employer is obligated to pay. Congress also eliminated some mitigating circumstances which could excuse payment by the employer, such as interim earnings from other employers. However, none of this detracts from the basic meaning of "back pay" to encompass only that amount of money that the employee would have earned had the employer given the employee a full 60 days of notice.

Congress also indicated in the statute that it knew the difference between "back pay" and "penalty". If an

employer fails to give the local government unit 60 days' notice of the layoff or plant closing, the employer is subject to a "civil penalty" of $500 per day for each of the 60 days of violation. 29 U.S.C. § 2104(a)(3). Very clearly, Congress meant for an employer to be subject to a $500 a day penalty, regardless of whether employees worked on those days or not. Thus, Congress has clearly established, within the framework of this statute, the difference and the distinction between a penalty and back pay. The term "for each day of violation" is simply used by Congress to define the period of time for which back pay is due. It clearly did not intend to change the meaning of "back pay" by the use of the language in question.

Petitioners also attempt to rely on the Congressional history of the statute to support its argument. However, Petitioners ignored a significant point on which the Fifth Circuit rendered its decision, making clear the intent of the legislation to make employees whole, not penalize employers who give less than 60 days' notice.

Senators Metzenbaum, Kennedy and Simon originally introduced this statute as the Economic Dislocation and Worker Adjustment Assistance Act (S. 538) in 1987. S. Rep. No. 62, 100th Cong., 1st Sess. 14 (1987). Senate majority leader Robert Byrd called up the bill as an Amendment to the Omnibus Trade Act of 1987 ("OTA"). 133 Cong. Rec. S. 9389-90 (Daily Ed. July 8, 1987). After

a presidential veto of the OTA, Senator Metzenbaum reintroduced the plant-closure and mass-layoff provisions as the WARN Act on June 16, 1988. Senator Metzenbaum himself noted that the WARN Act provisions as introduced were identical to the provisions of S. 538 as incorporated into the OTA. 134 Cong. Rec. S. 8375 (Daily Ed. June 22, 1988). The Senate's report, as originally introduced by Senator Metzenbaum, makes clear the make-whole intent of the provision that has become Section 5(a)(1) of the WARN Act:

> For violations of the notice provisions, damages are to be measured by the wages and fringe benefits (including reimbursement for medical expenses) the employee would have received had the plant remained open or the layoff been deferred until the conclusions [sic] of the notice period, less any wages or fringe benefits received from the violating employer during that period.

S. Rep. No. 62, 100 Cong., 1st Sess. 24 (1987) (Emphasis added).

Indeed, in defending the current text of Section 5(a)(1) of the WARN Act, in Senate floor debates, Senator Metzenbaum emphasized:

> The fact is we do provide that if the notice is not given then there is an obligation to make up the salary, but we do not want anybody to think that this

> bill is a way of providing additional financial obligations on the part of employers. That is not the object of this bill.

134 Cong. Rec. S. 8542-43 (Daily Ed. June 24, 1988) (Emphasis added).

Without question, the Congressional history points to the fact that when Congress used the term "back pay", it meant that the employees would be made whole for any loss of wages that they may have suffered as a result of an employer laying them off prior to receiving 60 days' notice, and nothing more. Petitioners' assertion to the contrary is simply not supported by the Congressional history nor the language of the statute defining an employer's obligation to an employee as "back pay" rather than a "penalty".

C. Petitioners' claim that the Fifth Circuit's decision is contrary to regulations promulgated under the statute raises issues not before the Court in this case.

Petitioners claim that this Court should grant a Petition for Writ of Certiorari based on the fact that the Fifth Circuit decision is contrary to the final regulations promulgated under the statute. After making this assertion, Petitioners use an example of a seasonal employee who may have been laid off during the summer that the Dillard's/Holmes merger occurred. However, this simply is not the fact situation that is before this Court.

Further, even if this fact situation were before the Court, clearly where a statute and implementing regulations conflict, the statute, not the regulations, prevail. See Board of Governors v. Dimension Financial, 474 U.S. 361, 374 (1986). See also K-Mart Corp. v. Cartier, Inc., 486 U.S. 281, 291 (1988). Regulations inconsistent with the statute from which the regulations draw their authority are invalid. Board of Governors, 474 U.S. at 374.

V. CONCLUSION

The Supreme Court has already denied, this year, a Petition for Certiorari, as well as a Petition for Rehearing based on a split in the circuits on this very issue. This is a rather simple issue that the circuits can resolve amongst themselves, or Congress can resolve for them. The decision of the Fifth Circuit Court of Appeals is sound and should not be disturbed. Petitioners' question of whether, under the WARN Act, employees are to be paid the amount of wages they would have earned had they not been laid off prior to receiving a full 60 days' notice or whether they should be paid a day's wages for every day the employee does not receive 60 days' notice, including days the employee would not have worked, is readily and easily answered by the bill's sponsor, Senator Metzenbaum: ". . . damages are to be measured by the wages . . . the employee would have received had the plant remained open or the layoff been

deferred until the conclusions of the notice period. . .." S. Rep. No. 62, 100 Cong., 1st Sess. 24 (1987).

Respondents respectfully request the Supreme Court deny Petitioners' Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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